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EX PARTE OR LATE FILED

December 17, 1999

The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: CC Docket No. 99-295: *Application by New York Telephone Company (d/b/a Bell Atlantic – New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc. for Authorization to Provide In-Region, InterLATA Services in New York.*

Dear Chairman Kennard:

Rhythms NetConnections Inc., in conjunction with Rhythms Links Inc. (collectively "Rhythms"), files this letter in accordance with the Commission's December 10, 1999 Public Notice[1] in CC Docket No. 99-295 and in response to Bell Atlantic-New York's ("BA-NY's") December 10, 1999 letter to the Honorable William E. Kennard[2] in which BA-NY proposed establishing a separate affiliate to provide digital subscriber line ("DSL" or "xDSL") services in order to meet it obligations under Section 271 of the Telecommunications Act of 1996 (the "1996 Act" or the "Act").[3] As proposed by BA-NY, this last ditch effort to achieve interLATA relief must fail.

BA-NY's seriously flawed separate affiliate proposal cannot and must not be the basis for achieving approval under Section 271. In offering to establish a separate affiliate for the provision of xDSL services in New York, BA-NY neither indicates that it has cured the demonstrated deficiencies in its pending 271 application as required by the express language of the statute and the orders of this Commission, nor proposes a solution designed to cure these flaws. Rather, BA-NY exacerbates these failures by proposing measures that would allow it to

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1 *Ex Parte* Letter Filed in Connection with Bell Atlantic's Section 271 Application for New York, CC Docket No. 99-295, Public Notice (DA 99-2779) (rel. Dec. 10, 1999).

2 Letter from Thomas J. Tauke, Bell Atlantic, to Hon. William E. Kennard, Chairman, Federal Communications Commission (Dec. 10, 1999) ("BA Letter").

3 47 U.S.C. § 271.

evade its statutory obligations under both sections 271 and 272 and to continue to discriminate against data competitive local exchange carriers ("CLECs") for at least an additional six months. Consequently, since BA-NY's proposal not only fails to address, let alone cure, its failures to meet the statutory checklist obligation to open its market to competition, but also unduly favors its affiliate over competing providers of advanced data services in New York, the separate subsidiary cannot and should not be deemed sufficient to enable BA-NY to obtain interLATA entry. Thus, the Commission should condition such approval on BA-NY immediately providing data CLECs with a meaningful opportunity to compete with BA-NY in providing advanced services, including xDSL services, at commercially scalable order volumes. The modified SBC/Ameritech merger conditions proposed in the BA Letter do not—and indeed were not designed to—achieve this goal.

Rhythms believes that a properly-structured separate subsidiary can address many of the anticompetitive and discriminatory behaviors inherent in BA-NY's current structure. Unfortunately, the proposal submitted by BA-NY falls far short of meeting this objective. Accordingly, the Commission must strengthen the subsidiary requirements to ensure that they comport with section 272 and must ensure that any separate subsidiary is a truly separate, arms-length subsidiary that prevents BA-NY from unduly favoring the affiliate through transfer of assets, line-sharing or joint marketing arrangements. Approval of BA-NY's 271 application must be conditioned on a demonstration of full compliance with these requirements and with its checklist obligations to advanced services providers. Ultimately, in addition to ordering the creation of a truly separate subsidiary, however, approval of the 271 application must be conditioned on compliance with the checklist, which requires, as Rhythms argued in its comments, a Commission order that (i) BA-NY provide data CLECs with real-time, electronic access to its databases containing loop make-up information, and (ii) BA-NY immediately fill requests by data CLECs for clean copper loops of any length at rates, terms and conditions that do not impede the services the CLECs may provide over such loops.

I. INTRODUCTION

As Rhythms has repeatedly stated,[4] Rhythms has no desire to prevent BA-NY from providing "long distance" service in New York or anywhere else; Rhythms is not in the business of providing long distance services, and consequently is not affected by Bell Atlantic's entry into the long distance business. Rhythms is directly affected by Bell Atlantic's failure to live up to its market-opening obligations as set forth in sections 251 and 271 of the Act. Rhythms is in the business of providing advanced services, and in particular xDSL services, to business and residential customers in New York and many other jurisdictions. As an advanced services provider, Rhythms is wholly dependent upon BA-NY opening its local market to competition and providing Rhythms with non-discriminatory access to unbundled network elements—particularly clean copper loops—and collocation. For Rhythms to provide competitive advanced services in New York, BA-NY must meet its obligations under the Act,

[4] *E.g.*, Rhythms Comments at 2.

and in particular, BA-NY (i) must provide Rhythms with nondiscriminatory access to clean copper loops of any length (or the copper portion of loops) at reasonable rates, terms and conditions, and (ii) must provide Rhythms with real-time, electronic access to any BA-NY databases that contain any loop make-up information. Distressingly, however, the record in this proceeding demonstrates that BA-NY does not provide Rhythms or other data CLECs with either of these requirements. Consequently, BA-NY has failed to comply with checklist items (ii) and (iv) of the Section 271 competitive checklist.[5] As a result, Rhythms cannot support BA-NY's application until such time as BA-NY demonstrates it has met these obligations for data CLECs, including Rhythms.

II. BA-NY'S PROPOSAL TO CREATE A SEPARATE xDSL AFFILIATE DOES NOT ADDRESS THE DEFECTS OF ITS SECTION 271 APPLICATION

While BA-NY claims that by creating a separate affiliate for the provision of xDSL services, BA-NY would "ensure" data CLECs "receive non-discriminatory access to services and facilities,"[6] BA-NY fails to offer any evidence or support purporting to show how the creation of the affiliate addresses in any manner its competitive checklist deficiencies. Specifically, in proposing the Modified Merger Conditions,[7] BA-NY fails to show that such conditions have cured (or even will cure) BA-NY's refusal to provide real-time, electronic access to its loop make-up information, BA-NY's refusal to provide loops over 18,000 feet on reasonable and non-discriminatory rates, terms and conditions, and BA-NY's inability to timely provision xDSL loops.[8]

BA-NY's claim that it does not need to meet these obligations to gain interLATA authority because "it is unquestionably true that these [xDSL] new services were not contemplated by Congress at the time of the 1996 Act, and have little if anything to do with the well-recognized congressional policy behind section 271"[9] is unquestionably wrong. If BA-NY means by this claim that its requirement to provide competitors with xDSL loops is not required by the Act, but merely by Commission orders, then its claim is patently ludicrous. Congress mandated that this Commission not grant a section 271 application unless the applicant first demonstrated that it was providing competitors with "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."[10] Section 251(c)(3) of the Act requires BA-NY to provide CLECs with access to unbundled network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in

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5 *See, e.g.,* Rhythms Comments at 7-13; Comments of Covad Communications Company at 8-32.

6 BA Letter at 1.

7 BA Letter, Commitment to Establish Separate Data Affiliate ("Modified Merger Conditions").

8 *See* Reply Comments of Covad Communications Company at 5.

9 BA-NY Reply Comments at 12 n. 11.

10 47 U.S.C. § 271(c)(2)(B)(ii).

accordance with . . . the requirements of this section and section 252."[11] Further, Congress mandated that the Commission "establish regulations to implement the requirements of this section [251]."[12] Accordingly, Congress clearly granted to this Commission the power to establish rules determining how BA-NY must provide reasonable and nondiscriminatory access to network elements for Section 271 analysis. Further, as BA-NY is well aware, the authority of this Commission to establish rules implementing the Act was resoundingly affirmed by the United States Supreme Court in *AT&T Corp. v. Iowa Util. Bd.*[13]

If instead, BA-NY means that it did not have to provide reasonable and non-discriminatory access to network elements at the time it filed its application because the Commission had yet to order its network element list on remand from the Supreme Court, and therefore, BA-NY was unclear of its unbundling obligations, then BA-NY's claim is specious and disingenuous. This Commission has repeatedly and consistently concluded that the obligations indicated above are all obligations that BA-NY has always had under Section 251(c)(3) of the Act.[14] Indeed, the Commission first held that incumbents such as BA-NY must provide CLECs with access to xDSL loops and pre-ordering operations support systems in 1996.[15] Most recently, the Commission again reiterated this requirement in the UNE Remand Order.[16] Moreover, while the Supreme Court in Iowa Utilities vacated and remanded the Commission's original UNE list, Bell Atlantic committed to this Commission that it would continue to provide to CLECs the UNEs identified in the original UNE list until the Commission established a new list. Thus, BA-NY's obligations to provide CLECs with xDSL loops and pre-order OSS access have been in place consistently since 1996. Consequently BA-NY must have demonstrated that it is meeting these obligations in order to satisfy Section 271 checklist item (ii).[17]

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[11] 47 U.S.C. § 251(c)(3).

[12] 47 U.S.C. § 252(d)(1).

[13] 119 S.Ct. 721 at 721-732 (Jan. 25, 1999) ("Iowa Utilities"); ". . . § 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." *Id.* at 731.

[14] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order ¶¶ 381-385 (1996) ("Local Competition Order"); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking ¶¶ 52-56 and 157-159 (1998); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, CC Docket No. 98-147, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking (rel. March 31, 1999) ("Advanced Services Order"); and *Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking ¶¶ 166-195 and 425-431 (rel. Nov. 5, 1999) ("UNE Remand Order").

[15] Local Competition Order ¶¶ 381-385.

[16] UNE Remand Order ¶¶ 166-195 and 425-431.

[17] 47 U.S.C. § 271(c)(2)(B)(ii).

In addition, the New York Public Service Commission ("NYPSC") has recognized that BA-NY failed to provide data CLECs with nondiscriminatory access to xDSL loops at reasonable rates, terms and conditions, and has established a collaborative process to address BA-NY's provision of xDSL loops.

> The collaborative was convened on August 10, 1999 and is meeting regularly. Before the collaborative are the central issues raised by xDSL providers in this proceeding. The collaborative is currently addressing loop qualification for ordering, loop provisioning and maintenance, and xDSL loop de-conditioning. It will then address spectrum management.[18]

The collaborative continues to meet on a regular basis to attempt to address these issues.

The only area in which the collaborative has made substantial progress is in the development of a loop acceptance testing process. Data CLECs agreed to implement this process, voluntarily taking extra steps and incurring additional costs (such as setting up toll-free numbers for BA-NY technicians to call to verify a line has been properly installed and conducting tests of the central office wiring performed by BA-NY prior to the due date), in a last ditch effort to get BA-NY to improve its provisioning of xDSL loops. Yet, despite the development of this process along steps proposed by BA-NY and burdensome to CLECs, in the period between November 8, 1999 and November 27, 1999, only 36 % of Rhythms xDSL loop orders placed with BA-NY passed the acceptance test on time. Thus, even after several months of NYPSC sponsored collaborative meetings, BA-NY still fails to reasonably and nondiscriminatorily provision xDSL loops to data CLECs.

In addition, the proposed conditions do not even attempt to address BA-NY's shortcomings in providing real-time, electronic access to loop make-up information. Even though the SBC/Ameritech conditions included provisions regarding the availability of specific loop data,[19] BA-NY does not proposed to abide by even these limited obligations. Strategically, BA-NY does not propose abide any of the Merger Conditions pertaining to the provision of loop make-up information[20] or to access to advanced services operations support systems.[21] As this Commission recognized in the UNE Remand Order, data CLECs require access to

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[18] NYPSC Comments at 93.

[19] *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order at Appendix C ("Conditions") ¶¶ 15-20 and 25-34 (rel. Oct. 8, 1999) ("Merger Order").

[20] Merger Order at Appendix C ("Conditions") ¶¶ 19-20.

[21] *Id.* at Appendix C ("Conditions") ¶¶ 15-18, 25-34.

comprehensive loop make-up information in order to "make an independent judgment about whether the loop is capable of supporting the advanced services equipment the requesting carrier intends to install."[22] Consequently, the Commission concluded that "at a minimum, incumbent LECs must provide requesting carriers the same underlying information that the incumbent LEC has in any of its own databases or other internal records."[23] Yet, BA-NY consistently refuses to provide CLECs with access to any of its databases other than the limited loop qualification database created to support its retail DSL offering.[24] Thus, BA-NY's provision of loop make-up information belies a fundamental misunderstanding of its obligation to provide such information. Specifically, BA-NY's proposal for providing loop make-up information completely misses the point that

> under [the Commission's] existing rules, the relevant inquiry is not whether the retail arm of the incumbent has access to the underlying loop qualification information, but rather whether such information exists anywhere within the incumbent's back office and can be accessed by any of the incumbent LEC's personnel. . . . To permit an incumbent LEC to preclude requesting carriers from obtaining information about the underlying capabilities of the loop plant in the same manner as the incumbent LEC's personnel would be contrary to the goals of the Act to promote innovation and deployment of new technologies by multiple parties.[25]

The arbitrators in the arbitration brought by Rhythms and Covad against Southwestern Bell Telephone Company ("SWBT") in Texas recently reached this same conclusion.[26] Further, the arbitrators ordered SWBT to provide real-time, electronic access to loop make-up information in the pre-ordering phase to Rhythms and Covad no later than May 30, 1999.

> SWBT's pre-qualification and loop qualification systems as currently described are *not* a reasonable substitute for pre-order access to actual loop makeup information. . . . The Arbitrators order SWBT to develop and deploy enhancements to its existing Datagate and EDI interfaces that will allow CLECs, as well as SWBT's retail operations or its advanced service subsidiary, to have real-time electronic access as a preordering functions the loop makeup

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22 UNE Remand Order ¶ 427.

23 *Id.*

24 *See* Rhythms Comments at 13-22; Rhythms Reply Comments at 8-11.

25 UNE Remand Order ¶ 430.

26 *Petition of Rhythms Links Inc. for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Docket No. 20226, Public Utility Commission of Texas, Arbitration Award at 60-63 (Nov. 30, 1999).

> information . . . SWBT shall develop these enhancements as soon as possible, but not to exceed six months from the Award in this Arbitration.[27]

Until BA-NY offers CLECs real-time, electronic access to all of its databases containing any loop make-up information, this Commission must not find that BA-NY is meeting its checklist obligations. Since BA-NY fails either to recognize the fundamental flaws in how it provides CLECs with loop make-up information or to propose corrections to these flaws in the Modified Merger Conditions, BA-NY's proposal to create the affiliate cannot and will not cure its application.

BA-NY has offered no evidence—nor could it—that the proposed affiliate addresses these crucial failures to comply with the Section 271 competitive checklist. Nothing about an affiliate in any way alters BA-NY's performance under the Act in providing the checklist items to data competitors. The facts remain, BA-NY has failed to demonstrate that it is providing unbundled loops to data CLECs in a manner that comports with the market-opening requirements required by Section 271. Unless and until BA-NY makes such a showing, its application must be denied.

III. THE MODIFIED MERGER CONDITIONS FAVOR THE BA-NY AFFILIATE AND DO NOT CREATE A TRULY SEPARATE AFFILIATE.

While a separate subsidiary cannot cure the provisioning deficiencies evidenced in BA-NY's application, a properly structured, fully separate subsidiary could address many the discrimination and anticompetitive concerns raised by data CLECs. However, as Rhythms strenuously argued during this Commission's consideration of the SBC/Ameritech merger conditions, the subsidiary requirements upon which the merger was conditioned are wholly insufficient to achieve this objective.[28] Not only does the affiliate proposed under the SBC/Ameritech merger conditions fail to establish a truly separate subsidiary that could meet these goals, but the timing of the affiliate obligations raises serious discrimination concerns.[29] Further, by its very terms the affiliate structure fails to meet the section 272 separate affiliate requirements, which BA-NY has a statutory obligation to abide by when entering the interLATA

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[27] *Id.* at 62.

[28] *See Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC,* CC Docket No. 98-141, Comments of Rhythms NetConnections Inc. (filed July 19, 1999) ("Rhythms Merger Comments"); *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC,* CC Docket No. 98-141, Reply Comments of Rhythms NetConnections Inc. at 2-9, 14-18 (filed July 26, 1999) ("Rhythms Merger Reply Comments").

[29] *See* Modified Merger Conditions ¶¶ 4 and 6; *see also* Merger Order ¶ 357 and Appendix C ("Conditions"), ¶ 3.

market.[30] Finally, the Commission carefully and directly stated in its Merger Order that the SBC/Ameritech merger conditions carry absolutely no precedential weight in analyzing a Section 271 application.[31] Despite this clear statement, BA-NY seeks to use these conditions to somehow rehabilitate its deficient application.

As proposed by BA-NY, the separate subsidiary exacerbates rather than eliminates the discriminatory and anticompetitive treatment of BA-NY's retail DSL offerings. It does not require an in-depth analysis to determine that BA-NY's proposed affiliate would be treated substantially differently than data CLECs. This discriminatory favoritism directly contravenes the requirements of nondiscrimination prominently required to satisfy section 271's competitive checklist. Moreover, such favoritism is only possible because the proposed affiliate is not a truly separate subsidiary that would satisfy the requirements of section 272 or achieve the goal of limiting anticompetitive and discriminatory behavior towards data CLECs.

First, under the proposed conditions, data CLECs would not be placed at parity with the BA-NY affiliate. For instance, the affiliate would be able to line share immediately, whereas data CLECs would not be able to obtain line sharing until July 1, 2000.[32] Under this arrangement, BA-NY's difficulties in providing data CLECs with xDSL loops are completely irrelevant to the affiliate as the affiliate could obtain all of its loops via line sharing immediately. Moreover, the affiliate would have over half a year in which it would be the only carrier that could provide xDSL services to New York consumers that only have one xDSL loop facility capable of serving them – *i.e.*, their existing voice loop. By the time this discriminatory arrangement finally ends, BA-NY through the affiliate will be providing xDSL services to all the New York customers it intends to, and will have effectively shut competitors out of the market.

The surrogate line sharing discount and the interim line sharing proposals in the BA-NY proposed conditions[33] utterly fail to address the discrimination inherent in BA-NY's willingness to provide line sharing to the affiliate immediately, but not to CLECs until July 1, 2000.[34] As discussed above, the ability of the affiliate to provide advanced services via line sharing more than half a year before data CLECs can line share places data CLECs at a significant competitive disadvantage in the marketplace. Moreover, the BA-NY proposed July 1, 2000 date is

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30 47 U.S.C. § 272(a)(2) ("The services for which a separate affiliate is required . . . are . . . [o]rigination of interLATA telecommunications services . . .").

31 Merger Order ¶ 357.

32 BA Letter, Commitment to Establish Separate Data Affiliate ¶¶ 4 and 13.

33 BA Letter, Commitment to Establish Separate Data Affiliate ¶ 13.

34 *Id.* ¶¶ 4 and 13.

inconsistent with the outside date by which BA-NY must provide CLECs with line sharing under the Line Sharing Order – June 2, 2000.[35]

The proposed surrogate line sharing discount does not cure this discrimination. Reducing the amount a CLEC must pay BA-NY for an xDSL loop in no way enables that CLEC to provide service to customers that can only obtain advanced services via line sharing. Nor will the surrogate line sharing discount address the discrepancy between the relatively short intervals that BA-NY provisions DSL for its retail customers compared to the egregiously long intervals experienced by Rhythms. For example, under BA-NY's tariffed intervals for provisioning xDSL loops to CLECs, BA-NY may take as long as fourteen business days to provision an xDSL loop (where no loop de-conditioning is required).[36] Yet, Bell Atlantic provisions DSL service to its retail customers in six days.[37]

Further, the proposed 50 % discount is inconsistent with the Line Sharing Order and overstates that amount data CLECs should have to pay for the line sharing unbundled network element. In the Line Sharing Order, this Commission explicitly requires "that incumbent LECs charge no more to competitive LECs for access to shared local loops that the amount of loop costs the incumbent LEC allocated to ADSL services when it established its interstate retail rates for those services."[38] Nothing in the Modified Merger Conditions proposed by BA-NY indicates that Bell Atlantic allocated any portion, let alone 50 %, of its loop costs to its retail ADSL services. Thus, the surrogate line sharing charge does not obviate even the cost facets of BA-NY's proposed discriminatory application of line sharing, since the BA affiliate will have a $0 cost of loop, while CLECs will have a cost greater than $0.

Second, the affiliate is not sufficiently separate to meet the requirements of sections 271 and]272. Section 272 requires BA-NY create a separate affiliate to provide for the "[o]rigination of interLATA telecommunications services . . ." This separate affiliate "shall operate independently from the Bell operating company,"[39] and "shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection."[40] The affiliate complies

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[35] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98 ¶¶ 130 and 161-177 (rel. Dec. 9, 1999) ("Line Sharing Order").

[36] *See* Rhythms Comments, Joint Affidavit of Eric H. Geis and Robert Williams ¶ 56 (citing *New York Telephone Company Tariff P.S.C. No. 916*, Revisions, section 5.5.3 (Issued Aug. 30, 1999).

[37] *New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts Section 271 of the Telecommunications Act of 1996 Compliance Filing*, D.T.E. 99-271, Interrogatory Response DTE RR 81 (Nov. 19, 1999) ("The interval for BA-MA to provision ADSL service to its own retail customers is 6 days.").

[38] *Id.* ¶ 139.

[39] 47 U.S.C. § 272(b)(1).

[40] 47 U.S.C. § 272(b)(5).

with neither of these requirements. For example, Bell Atlantic proposes to provide funding to the affiliate.[41] Until February 1, 2000, Bell Atlantic may purchase advanced services equipment for the affiliate.[42] BA-NY and the affiliate may joint market their services and may each provide customer care for the other.[43] Indeed, the Merger Conditions themselves expressly state that they are not fully complaint with Section 272.

> [T]he separate Advanced Services affiliate(s) required by this Section I shall operate in accordance with the structural, transactional, and non-discrimination requirements that would apply to a separate affiliate's relationships with a Bell Operating Company ("BOC") under 47 U.S.C. § 272(b), (c), (e), and (g), as interpreted by the [Commission] as of August 27, 1999, *except to the extent those provision are inconsistent with the provisions of this Paragraph, in which case the provisions of this Paragraph shall apply.*[44]

Thus, the affiliate cannot qualify as a Section 272 separate affiliate.

The SBC/Ameritech merger conditions were just that, conditions on a forward looking merger, expressly intended to be applied on a forward-looking basis to address forward-looking competitive harms. "The conditions [were] designed to address potential public interest harms specific to the merger of the Applicants."[45] Further, the Commission went out of its way to emphasize that the SBC-Ameritech merger conditions were specific to that merger, did not substitute for the provisions of the Act or the Commission's own Orders under the Act, and did not redefine any legal obligations of any ILEC.[46] The Commission's analysis of the BA-NY Section 271 Application must be governed by a very different statutory imperative—Section 271. Section 271 only permits the Commission to grant BA-NY's application if BA-NY "*has fully implemented* the competitive checklist"[47] Thus, BA-NY must have been compliant with Section 271 at the time it files its application. As the Commission has repeatedly emphasized, promises of future performance may not be used to show current compliance with Section 271:

> [W]e find that a BOC's promises of future performance to address particular concerns raised by commenters have *no probative value* in

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41 BA Letter, Commitment to Establish Separate Data Affiliate ¶ 3.

42 *Id.* ¶ 11.

43 Merger Order at Appendix C ("Conditions") ¶ 3(a).

44 *Id* ¶ 3.

45 Merger Order ¶ 357. Further, the Commission determined that SBC's "package of conditions . . . alters the public interest balance of the proposed merger by mitigating substantially the potential public interest harms while providing additional public interest benefits." *Id.* at ¶ 349.

46 *See infra* at pp. 10-11.

47 47 U.S.C. § 271(d)(3)(A)(i).

> demonstrating its present compliance with the requirements of section 271. *Paper promises do not, and cannot, satisfy a BOC's burden of proof.* In order to gain in-region, interLATA entry, a BOC must support its application with actual evidence demonstrating its *present compliance* with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior. Significantly, the timing of a section 271 filing is on that is solely within the applicant's control. We therefore expect that, when a BOC files its application, it is already in full compliance with the requirements of section 271 and submits with its application sufficient actual evidence to demonstrate such compliance. *Evidence demonstrating that a BOC intends to come into compliance with the requirements of section 271 by day 90 is insufficient.* If after the date of filing, the BOC concludes that additional information is necessary, or additional actions must be taken, in order to demonstrate compliance with the requirements of section 271, then the BOC's application is premature and should be withdrawn.[48]

Thus, prospective paper promises may not be used by the Commission to evaluate BA-NY's Section 271 Application.[49]

In approving the SBC/Ameritech merger conditions, this Commission expressly found that merger conditions do not have any bearing on an incumbent's compliance with Section 271.

> Even though some of the conditions may relate to other requirements that SBC and Ameritech are or will be subject to under the Act or our rules, the conditions that we adopt in this merger proceeding are not intended to prejudge, or override, Commission action in other proceedings . . . .
>
> Nor are the conditions that we adopt today intended to be considered as an interpretation of sections of the Communications Act, especially sections 251, 252, 271 and 272, or the Commission's rules, or any other federal statute including the antitrust laws. *The conditions are designed to address potential public interest harms specific to the merger of the Applicants, not the general obligations of incumbent LECs or the criteria for BOC entry into the interLATA*

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[48] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, CC Docket No. 97-137, Memorandum Opinion and Order ¶ 55 (Aug. 19, 1997) (emphasis added). Further, the Commission went on to "find that enforcing our requirement that all BOC applications be factually complete when filed is fair and does not pose an undue hardship to the BOC. We note that our procedural requirements governing section 271 applications have been in effect since December 6, 1996. . . . Thus, there can be no doubt that Ameritech and other BOCs have had sufficient notice of the Commission's procedural requirements and our intention of enforcing them." *Id.* ¶ 56.

[49] Additionally, relying in any amount on a filing made after the statutorily set comment period has run completely undermines the Act's requirement that the Commission "give substantial weight" to the evaluation of the Department of Justice ("DOJ"), as the DOJ has already filed its comments with the Commission. 47 U.S.C. § 271(d)(2)(A).

> *services market.* For example, the structure of the separate advanced services affiliate that is required under the conditions would not be adequate for SBC/Ameritech's provision of in-region, interLATA services following section 271 authorization . . . . All of the conditions that we adopt today are merger-specific and not determinative of the obligations imposed by the Act or our rules on SBC, Ameritech or any other telecommunications carrier. In particular, we note that our adoption of SBC/Ameritech's proposed conditions does not signify that, by complying with these conditions, SBC/Ameritech will satisfy its nondiscrimination obligations under the Act or Commission rules.[50]

Therefore, the implication in BA-NY's Letter that the Commission previously determined that a separate xDSL affiliate would ensure for Section 271 purposes that an incumbent was providing nondiscriminatory access to unbundled network elements necessary for the provision of advanced services is baseless. By its own terms, the Merger Order explicitly determined that the SBC/Ameritech merger conditions and future compliance therewith has no direct correlation to whether an incumbent has met the Section 271 competitive checklist.[51]

Moreover, each Section 271 application must be analyzed on its own individual merits. Conditions that may cure the defects of one Section 271 application may not be sufficient to cure a different application. If the Commission conditions approval here based solely on the Modified Merger Conditions, the Commission will significantly undermine its ability to individually analyze future Section 271 applications, and will instead establish the very dangerous precedent that the Modified Merger Conditions are sufficient to cure all Section 271 application deficiencies.

Taken as a whole, BA-NY's proposal must be rejected. Not only would it enshrine blatantly discriminatory behavior in favor of the BA-NY affiliate that would enable BA-NY to exercise a substantial marketplace advantage, but it fails to meet the requirements of section 272. BA-NY cannot eschew its statutory and regulatory obligations in this fashion.

IV. CONCLUSION

As Rhythms, the Department of Justice, the New York State Attorney General's Office, and the overwhelming majority of CLECs that commented on BA-NY's Section 271 Application conclusively demonstrated in their vast body of comments and reply comments, BA-NY has failed to meet its Section 271 competitive checklist obligations. In particular, BA-NY is not providing data CLECs with real-time, electronic access to loop make-up information, and with timely, nondiscriminatory access to unbundled xDSL loops at reasonable rates, terms and conditions. Consequently the Commission should reject BA-NY's Section 271 Application.

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[50] Merger Order ¶¶ 356-357 (footnotes omitted) (emphasis added).

[51] *Id.* ¶ 357.

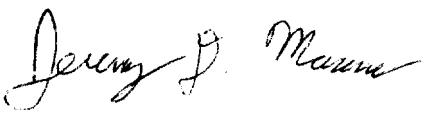
As demonstrated above, BA-NY's late proposal to establish the affiliate through the Modified Merger Conditions fails to cure the defects in the Section 271 Application. The Modified Merger Conditions do not address these defects, favor the BA-NY affiliate, fail to create a truly separate affiliate, and are inapposite for a Section 271 analysis. Thus, the Commission should not rely on the Modified Merger Conditions to approve BA-NY's Section 271 application.

Instead, if the Commission is going to approve the BA-NY application, it should condition such approval on the requirement that BA-NY create a truly separate advanced services subsidiary. The Commission must require that this affiliate fully comport with all of the requirements of section 272 of the Act; this necessitates (without limitation) that the Commission affirmatively reiterate that the affiliate operate fully at arms length from BA-NY, such that BA-NY is not permitted to transfer assets, provide line sharing, or provide joint marketing to the affiliate on rates, terms or conditions more favorable than those available to CLECs.

Further, as cures for BA-NY's checklist deficiencies, the Commission should order the following conditions: (i) the Commission should order BA-NY to immediately provide data CLECs with real-time, electronic access to its databases containing loop make-up information; and (ii) the Commission should order BA-NY to immediately fill requests by data CLECs for clean copper loops of any length, at rates, terms and conditions that do not impede the services the CLECs may provide over such loops. Finally, the Commission should order self-executing sanctions that will automatically apply if BA-NY fails to comply with any of these conditions or with any of the provisions of any of Commission's orders, including without limitation the Line Sharing Order, the UNE Remand Order, and the Advanced Services Order, designed to foster competition in the local marketplace.

Finally, if the Commission approves the application despite BA-NY's clear failure to meet the statutory requirements, the Commission should require that BA-NY comply fully with its legal obligations within a reasonably short time (*e.g.*, six months), subject to the Commission's withdrawal of its approval if BA-NY fails to meet this deadline. If the Commission is willing to grant such conditional approval, it must put such "teeth" into its Order so that BA-NY cannot simply ignore its outstanding failures once it has gained approval.

Respectfully submitted,



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